(2)

No. 04-39

Supreme Court, U.S.
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In The
Supreme Court of the United States

MILDRED GOLLIE,

Petitioner,

v.

ELKAY MINING COMPANY, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Title 30 U.S.C. § 921(c)(3) of the Black Lung Benefits Act provides an irrebuttable presumption that a miner's death is contributed to by coal workers' pneumoconiosis if a preponderance of the medical evidence establishes complicated pneumoconiosis or progressive massive fibrosis. The condition which triggers the irrebuttable presumption is established by: chest x-rays classified as revealing opacities greater than one centimeter (§ 921(c)(3)(A)); autopsy or biopsy evidence of massive lesions in the lungs (§ 921(c)(3)(B)); or a diagnosis by other means such as a CT scan that establishes a condition which could reasonably be expected to yield results described by x-ray, autopsy, or biopsy (§ 921(c)(3)(C)).

The Petition raises the following issue:

> Are the decisions of the United States Court of Appeals for the Fourth and Sixth Circuits consistent regarding how an administrative law judge must weigh the different types of medical evidence under 30 U.S.C. § 921(c)(3) when determining the existence of complicated pneumoconiosis?

PARTIES TO THE PROCEEDING

Petitioner

Mildred Gollie is the surviving spouse of Joseph Gollie, a former coal miner, who filed for federal black lung survivor's benefits pursuant to the provisions of the Black Lung Benefits Act. 30 U.S.C. § 901 (2001).

Respondent

Elkay Mining Company is the company which last employed Joseph Gollie in coal mine employment.

Party-In-Interest

The Director of the United States Department of Labor Office of Workers' Compensation Programs is designated by regulation as a party in all claims litigated under the Black Lung Benefits Act. 20 C.F.R. § 725.360(a)(5) (2001).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Elkay Mining Company is a wholly owned subsidiary of Thames Development, Ltd. which is a wholly owned subsidiary of Pittston Coal Company. Pittston Coal Company is a wholly owned subsidiary of Pittston Minerals Group, Inc. which is a wholly owned subsidiary of The Brink's Company. The Brink's Company is a publicly traded company on the New York Stock Exchange.

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BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit has jurisdiction over an appeal from a final order of the Benefits Review Board pursuant to Section 21(c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(c), as incorporated by Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a). The United States Court of Appeals for the Fourth Circuit rendered the decision at issue on April 8, 2004. The parties did not file any motions for rehearing. Petitioner timely filed her Petition for Writ of Certiorari within ninety days of that denial. *See* 28 U.S.C. § 2101(c); SUP. CT. R. 13.3. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

30 U.S.C. § 921(c)(3):

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due

> to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

STATEMENT OF THE CASE

This case involves a claim for survivor's benefits filed under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. §§ 901-945. (Petitioner's App. 55) Mildred Gollie, the surviving spouse of coal miner Joseph Gollie, filed her claim for benefits on June 20, 1996. (Petitioner's App. 56) Following a formal hearing, an Administrative Law Judge ("ALJ") issued a Decision and Order awarding benefits on July 30, 1999. (Petitioner's App. 54) The ALJ found the miner had complicated coal workers' pneumoconiosis[1] based on the opinion of the autopsy prosector, although he found no x-ray interpretations in the record revealing large opacities. (Petitioner's App. 63-65)

Elkay Mining Company appealed to the Benefits Review Board ("Board") which issued a Decision and Order on November 2, 2000, vacating the award of benefits and remanding the claim for further consideration. (Petitioner's App. 40) The Board found the ALJ erred by mechanically crediting the autopsy prosector's opinion. (Petitioner's App. 49-50) The Board remanded the case for reconsideration of all relevant evidence regarding the

[1] In the Black Lung Benefits Act, Congress defined coal workers' pneumoconiosis as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

existence of complicated coal workers' pneumoconiosis. The Board instructed the ALJ on remand to weigh the evidence regarding complicated pneumoconiosis in accordance with the decisions of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000) and *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999) which require an ALJ to determine whether the CT scan, biopsy, or autopsy findings would appear as an opacity greater than one centimeter when viewed on a chest x-ray.[2] (Petitioner's App. 51)

The ALJ issued a Decision and Order awarding benefits on remand dated February 1, 2001. (Petitioner's App. 32) He concluded the x-ray evidence fails to establish the presence of complicated pneumoconiosis. The ALJ found all of the pathologists noted the presence of a large lesion on the autopsy slides in the miner's right lung. The pathologists disagreed, however, regarding whether that large lesion constituted complicated coal workers' pneumoconiosis or progressive massive fibrosis. He found both Dr. Richard Naeye and Dr. Jerome Kleinerman testified the nodule observed on the autopsy slides would look like complicated coal workers' pneumoconiosis upon an x-ray. He found their testimony met the equivalency standard set forth in the decisions of the United States Court of Appeals for the Fourth Circuit. Accordingly, he awarded benefits. (Petitioner's App. 38)

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[2] Joseph Gollie's last coal mine employment occurred in the states of West Virginia and Virginia, and thus the applicable law is that of the United States Court of Appeals for the Fourth Circuit. *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989).

Elkay Mining Company appealed to the Board arguing the ALJ's finding of complicated pneumoconiosis was based on an incorrect application of the equivalency determination. The Director participated in the appeal and agreed with Elkay Mining Company that the ALJ's decision to award benefits could not stand because the ALJ mischaracterized the testimony of Drs. Naeye and Kleinerman and did not weigh the evidence according to the applicable law. (Petitioner's App. 24-25)

On March 29, 2002, the Board issued a Decision and Order again vacating the award of benefits. (Petitioner's App. 21) The Board agreed the ALJ mischaracterized the testimony of Dr. Kleinerman and ordered him to reconsider Dr. Kleinerman's assessment on remand. (Petitioner's App. 28-29) The Board also held the ALJ did not make the requisite equivalency determination regarding Dr. Naeye's assessment of the autopsy evidence and ordered him to reconsider Dr. Naeye's opinion on remand. (Petitioner's App. 27-28)

The ALJ issued a Decision and Order on remand denying benefits on June 28, 2002. (Petitioner's App. 16) He found upon reconsideration of the testimony of Drs. Naeye and Kleinerman that neither physician specifically stated the opacities found during the biopsy or autopsy would be equivalent to an opacity measuring more than one centimeter on an x-ray. Accordingly, he found their assessments insufficient to support a finding of complicated coal workers' pneumoconiosis pursuant to 30 U.S.C. § 921(c)(3). He also found all of the other pathologists failed to indicate whether the lesions found at autopsy would produce an opacity greater than one centimeter in diameter when viewed on x-ray. He concluded the

evidence is insufficient to establish complicated pneumoconiosis, and therefore, denied benefits. (Petitioner's App. 18-19)

Mrs. Gollie appealed to the Benefits Review Board. The Board issued a Decision and Order affirming the denial of benefits on July 31, 2003. (Petitioner's App. 4) Mrs. Gollie then filed a Petition for Review with the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the denial of benefits by decision dated July 31, 2003. *Gollie v. Elkay Mining Co.*, No. 03-2131 (4th Cir. April 8, 2004). (Petitioner's App. 1) Aggrieved with the Fourth Circuit's decision, Mrs. Gollie petitions this Court for review.

REASON FOR DENYING THE WRIT

The decisions of the United States Court of Appeals for the Fourth and Sixth Circuits are consistent regarding how an administrative law judge must weigh the different types of medical evidence under 30 U.S.C. § 921(c)(3) when determining the existence of complicated pneumoconiosis.

Title 30 U.S.C. § 921(c)(3) of the Black Lung Benefits Act provides an irrebuttable presumption that a miner's death is contributed to by coal workers' pneumoconiosis if a preponderance of the medical evidence establishes complicated pneumoconiosis or progressive massive fibrosis. The condition which triggers the irrebuttable presumption is established by: chest x-rays classified as revealing opacities greater than one centimeter (§ 921(c)(3)(A)); autopsy or biopsy evidence of massive lesions in the lungs

(§ 921(c)(3)(B)); or a diagnosis by other means such as a CT scan which establishes a condition which could reasonably be expected to yield results described by x-ray, autopsy, or biopsy (§ 921(c)(3)(C)). *See also* 20 C.F.R. § 718.304.

At issue is whether 30 U.S.C. § 921(c)(3) requires a determination if medical evidence under prongs (B) and (C) is equivalent to the objective standard set forth in prong (A). The decisions of the United States Court of Appeals for the Fourth and Sixth Circuits are consistent regarding how an ALJ must weigh the different types of medical evidence under 30 U.S.C. § 921(c)(3) when determining the existence of complicated pneumoconiosis.

In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro],* 220 F.3d 250 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit discussed the analysis an ALJ must complete before invoking the irrebuttable presumption under 30 U.S.C. § 921(c)(3). The Court held:

> While 30 U.S.C. § 921(c)(3) sets forth, in clauses (A), (B), and (C), three different ways to establish the existence of statutory complicated pneumoconiosis for purposes of invoking the irrebuttable presumption, these clauses are intended to describe a single, objective condition. Otherwise, the three prongs would be describing different conditions, leading to "the irrational result that the determination of whether a miner has [statutory complicated pneumoconiosis] could turn on the method of diagnosis rather than on the severity of his disease." *Double B Mining*, 177 F.3d at 243. Therefore, in applying the standards set forth in each prong, "one must perform equivalency determinations to make certain that regardless of which diagnostic technique is used, the same

> underlying condition triggers the irrebuttable presumption." *Id.*; *see also Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981). And, "[b]ecause prong (A) sets out an entirely objective scientific standard" – i.e., an opacity on an x-ray greater than one centimeter – x-ray evidence provides the benchmark for determining what under prong (B) is a "massive lesion" and what under prong (C) is an equivalent diagnostic result reached by other means. *Double B Mining*, 177 F.3d at 243.

Scarbro, 220 F.3d at 255-56.

In 30 U.S.C. § 921(c)(3)(A), Congress mandated the condition that triggers the irrebuttable presumption is one that creates an opacity greater than one centimeter in diameter on an x-ray. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). Congress did not define what constitutes a "massive lesion" under prongs (B) and (C). Consequently, the Fourth Circuit held when the condition triggering the irrebuttable presumption is diagnosed by autopsy rather than x-ray, an ALJ must determine whether the autopsy results reveal a condition that would produce opacities of greater than one centimeter in diameter on an x-ray, the only objective benchmark provided by Congress. *Double B Mining*, 177 F. 3d at 243; *Scarbro,* 220 F.3d at 255-56.

The Petitioner contends the United States Court of Appeals for the Sixth Circuit's decision in *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1991), presents a different interpretation of 30 U.S.C. § 921(c)(3). The Petitioner cites *Gray* as noting complicated pneumoconiosis may be established by the finding of massive lesions on autopsy or biopsy without determining if the different types of evidence are

equivalent. (Petition for Cert. at 7). The Petitioner's interpretation of *Gray* is mistaken. The Sixth Circuit's holding in *Gray* does not conflict with the decisions of the Fourth Circuit.

In *Gray,* the Sixth Circuit specifically agreed with the Fourth Circuit's reasoning concerning an equivalency determination between the different types of evidence under § 921(c)(3) stating as follows:

> The one-centimeter standard applicable to x-rays simply does not apply to autopsy evidence. *See Riddle v. Director, Office of Workers' Compensation Programs,* 1995 U.S. App. LEXIS 34215, 1995 WL 715303 (4th Cir. Dec. 6, 1995) (per curiam), where the court explained:
>
> > Dr. Hansbarger's finding of a fibrotic nodule measuring 1.8 centimeters in diameter was insufficient to invoke the irrebuttable presumption found at § 718.304. The regulations provide that an opacity, yielded by an *X-ray,*of more than one centimeter, is sufficient to establish "complicated pneumoconiosis" and invoke the irrebuttable presumption. *See* § 718.304(a). The nodule in this case, however, appeared by autopsy. Under such circumstances, the nodule could only justify invocation of the presumption if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, or an opinion that such a nodule constitutes a "massive lesion."

> Unpublished op. at 4 (emphasis in original). *We agree with the Fourth Circuit's reasoning.* In Mr. Gray's case, Dr. Kleinerman testified that the lesions on the lung-tissue slides would not appear as opacities of greater than one centimeter on an x-ray. He also opined that the nodules on the lung-tissue slides were not the "massive lesions" described in the regulation.

Gray, 176 F.3d at 389-90 (emphasis added).

The Sixth Circuit in *Gray* also acknowledged 30 U.S.C. § 923(b) requires that "all relevant evidence" from each of the different categories of evidence set forth in § 921(c)(3) must be considered. "'[A]ll relevant evidence' means just that – all relevant evidence that assists the ALJ in determining whether a miner suffers from complicated pneumoconiosis." *Id.* at 389. Therefore, the Sixth Circuit's holding in *Gray* does not conflict with, and in fact supports, the Fourth Circuit's decision regarding the requirement of an equivalency determination. As no conflict between the circuits exists on this issue, the Writ should be denied.[3]

The Petitioner also contends the Fourth Circuit's interpretation of the statute is incorrect, and that no equivalency determination is necessary. The Petitioner alleges the Fourth Circuit ignored the word "or" in the text

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[3] The United States Court of Appeals for the Third Circuit has also held an equivalency determination is necessary when there is a question regarding whether nodules found by biopsy or autopsy would correspond to opacities viewed on an x-ray indicating complicated pneumoconiosis. *Clites v. Jones & Loughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981). Thus, the holdings in *Scarbro* and *Double B Mining* are consistent with the holdings of the Sixth and Third Circuits.

of § 921(c)(3). (Petition for Cert. at 5-6) The Fourth Circuit addressed this issue in the *Scarbro* decision as follows:

> Prongs (A), (B), and (C) are stated in the disjunctive; therefore a finding of statutory complicated pneumoconiosis may be based on evidence presented under a single prong. But the ALJ must in every case review the evidence under each prong of § 921(c)(3) for which relevant evidence is presented to determine whether complicated pneumoconiosis is present. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145 (4th Cir. 1993) (A claimant is entitled to the benefit of the § 921(c)(3) "irrebuttable presumption not because he has provided a single piece of relevant evidence, but because he has a 'chronic dust disease of the lung,' commonly known as complicated pneumoconiosis. To make such a determination, the OWCP necessarily must look at all of the relevant evidence presented"); *see also* 30 U.S.C. § 923(b) ("In determining the validity of claims under this part, all relevant evidence shall be considered"); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09 (4th Cir. 2000). Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict. Yet, "a single piece of relevant evidence," *Lester*, 993 F.2d at 1145, can support an ALJ's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs conflicting evidence in the record. Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence

> as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. *See Double B Mining*, 177 F.3d at 243-44.

Scarbro, 220 F.3d at 256. Thus, the Fourth Circuit acknowledged prongs (A), (B), and (C) of § 921(c)(3) are stated in the disjunctive. *Scarbro*, 220 F.3d at 256. The Fourth Circuit recognized that a claimant may establish complicated pneumoconiosis with evidence satisfying either prongs (A), (B), or (C), as long as all relevant evidence is considered and weighed. *Id.*

The problem with 30 U.S.C. § 921(c)(3) as noted by the Fourth Circuit is that Congress did not define what constitutes a "massive lesion" for purposes of prongs (B) and (C). *Scarbro*, 220 F.3d at 256. The Fourth Circuit held that because prong (A) of § 921(c)(3) provides the only objective, scientific benchmark, a determination is required regarding whether medical evidence under prongs (B) and (C) is equivalent to the objective standard set forth in prong (A). *Double B Mining*, 177 F. 3d at 243; *Scarbro*, 220 F.3d at 255-56. The ALJ must determine if the lesions found by autopsy, biopsy, or CT scan, would have appeared on a chest x-ray as an opacity greater than one centimeter. *Id.* Thus, the Petitioner's contention that the Fourth Circuit improperly interpreted the statute by ignoring the disjunctive "or" is unfounded. Rather, the Fourth Circuit's decisions provide a rational, legally appropriate interpretation of 30 U.S.C. § 921(c)(3) which does not conflict with the interpretations by any other United States Court of Appeals.

The Petitioner also argues an equivalency determination is unnecessary when a physician diagnoses progressive massive fibrosis (PMF). (Petition for Cert. at 6) Elkay

Mining Company agrees PMF is included in the definition of pneumoconiosis, and that this Court has noted complicated pneumoconiosis involves PMF. *See* 20 C.F.R. § 718.201; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). However, the diagnosis of PMF does not relieve the ALJ of his obligation to require the physicians of record to perform the equivalency analysis prior to determining if the evidence is sufficient to invoke the irrebuttable presumption under § 921(c)(3). Indeed, the mention of PMF by a physician or pathologist of record should trigger the requirement of the equivalency determination analysis if the ALJ finds that physician's opinion well-reasoned.

Finally, the Petitioner argues the autopsy report should control in the determination of the presence of and stage of pneumoconiosis in the absence of accuracy considerations or fraud. (Petition for Cert. at 7) The Petitioner cites an unpublished decision by the Sixth Circuit as support for this position. In that unpublished case, however, the Sixth Circuit held neither the ALJ nor the Benefits Review Board erred by refusing to assign determinative weight to the conclusions of the autopsy prosector because his opinion was not well-reasoned. *Bumgardner v. The Ohio Valley Coal Co.*, No. 98-3753, 1999 U.S. App. LEXIS 15160, *13 (6th Cir. July 2, 1999) (unpublished).

Thus, while autopsy and biopsy evidence are generally considered the "gold standard" in the determination of the existence and extent of coal workers' pneumoconiosis, the mere existence of this evidence does not automatically outweigh all other relevant evidence of record. Pursuant to *Double B Mining* and *Scarbro*, all relevant evidence must be considered in the determination of the existence of the disease and the equivalency analysis must be made where

evidence other than x-ray interpretations is used to diagnose pneumoconiosis in its complicated form.

Furthermore, the autopsy prosector is not automatically entitled to great deference as argued by the Petitioner. (Petition for Cert. at 7) No evidence exists that an autopsy prosecutor's ability to conduct a gross examination renders his opinion superior to those experts who merely reviewed slides and the autopsy report. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 n.6 (4th Cir. 2000) (*citing Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362-63 (7th Cir.1992) (noting that because "[n]othing in the record suggests that access to the body enhances the accuracy of diagnoses based on autopsy evidence," the ALJ erred in crediting the autopsy prosecutor's opinion over other medical opinions solely because the prosector had such access)). The Petitioner's argument that the prosector's autopsy findings of complicated pneumoconiosis must control without consideration of the other evidence of record and without the required equivalency determination is contrary to applicable law.

The Fourth Circuit's interpretation of 30 U.S.C. § 921(c)(3) as requiring a determination if medical evidence under prongs (B) and (C) is equivalent to the objective standard set forth in prong (A) is consistent with the intent of Congress and the holdings of the other circuits who have addressed this issue. Elkay Mining Company asserts the Fourth Circuit's decisions in *Scarbro* and *Double B Mining* are legally sound and should not be disturbed.

CONCLUSION

For these reasons, Elkay Mining Company requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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